No. 91-1259

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

LITTON MICROWAVE COOKING PRODUCTS,
DIVISION OF LITTON SYSTEMS, INC.,
(Predecessor to Microwave Products of America, Inc.)
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE

The petition filed by Litton in this case presents two questions. First, whether the pertinent statutory sections require an impasse in bargaining before an employer may make a unilateral change in a mandatory subject of bargaining, wages in this case? The second question presented is more specific: Do those statutory sections, as interpreted in *Katz*, require an employer bargaining in good faith with a union over an initial contract to grant merit increases to all represented employees because it has granted such increases to some employees in prior years, when the employer has provided the union with ample notice of its proposal not to pay such increases

and the union has been afforded ample opportunity to bargain over the proposal?

The Board opposes granting the petition claiming this is not an impasse case, conceding there is a conflict among various circuits over the impasse requirement.

This brief replies to the Board's brief in opposition.

ARGUMENT

1. First, there is a serious conflict between several circuits on the impasse issue. The Courts of Appeals for the Fifth and (presumably) Eleventh Circuits hold there is no impasse requirement, while the Courts of Appeals for the Second, Seventh, D.C. and Eighth Circuits hold an impasse is required. See petition (pp. 14-15) and reply brief (pp. 2-5) in Docket No. 90-1165.

2. The impasse issue is a significant one, affecting virtually every collective bargaining negotiation. It is a recurring problem, as can be seen by the number of circuit courts which have decided impasse cases. The impasse issue ought to be resolved.

3. The Board argues this case is not an impasse case. The Board is wrong. The impasse issue is directly raised in the decision of the Court below, which is the decision which petitioner is asking this court to review. The Court below flat out held that "until parties reach impasse in negotiations over labor matters, an employer must 'maintain the status quo as to wages and working conditions.' " Pet. App. A 3. That was the *only* rationale offered by the Court below in support of its decision to enforce the Board's order. The decision of the Court below directly raises an issue which is important to labor and management and which is presently in a state of

confusion because of a conflict between at least six Courts of Appeals.

The Board argues that its decision does not raise the impasse issue because the Board found Litton did not bargain "at all" over the payment or nonpayment of merit increases. Brief in Opp. p. 2. As will be noted shortly, this is wrong. According to the Board, this is a *Katz* case, *i.e.*, one where the employer unilaterally changes a mandatory condition of employment without notice to the union. While difficult to believe, Board Counsel apparently does not understand the decision. A review of the undisputed facts demonstrates this misunderstanding.

The Board's Administrative Law Judge (ALJ) found Litton had violated the Act by not paying February, 1981 merit increases. He pointed out that Litton had raised two defenses to the charge against it: (1) Litton denied "that it had a policy of February wage increases," and (2) that "it bargained to impasse over its proposal not to grant any wage increases" in February, 1981. Pet. App. C 8-9. In response to those defenses, the ALJ found Litton "had an established policy of wage reviews and raises in February of each year, and it was obligated to *bargain in good faith to impasse* with the Union before making any change in that policy." Pet. App. C 12. But, said the ALJ, Litton could not have "bargained to impasse before it refused to pay the February, 1981 wage increase" because he found Litton had bargained in bad faith on four other topics. Pet. App. C 13. Further, said the ALJ, even if Litton had not bargained in bad faith on the four other topics, he would still find Litton had bargained in bad faith on the February merit increase issue because he believed Litton's argument at the bargaining table that it had no policy of February wage increases "was created *ad hoc* for the purpose of deluding the

Union at the bargaining table." Pet. App. C 13. There are two things inherent in this finding: (1) Litton told the Union it proposed no February increases and (2) the parties discussed the proposal.

The Board adopted "the judge's findings that (Litton) made unilateral changes in violation of (the Act) by refusing to provide a regularly provided semiannual increase in February 1981." But, said the Board, it was not relying "on the judge's finding that (Litton) could not claim impasse because of its bad-faith bargaining since November 18, 1980." Pet. App. B 26, fn. 34. Indeed, it could not rely on that finding because it expressly rejected it. Pet. App. B 21. Further, the Board clearly appeared to have rejected the ALJ's alternative basis for finding a violation, *i.e.*, that Litton had created a false reason for not paying a February increase in order to delude the Union. The Board expressly stated, "We do not agree with this analysis." Pet. App. B 24.

Pointedly, while the Board rejected both underpinnings for the ALJ's finding of violation, it never rejected his statements that an impasse was required. Furthermore, the Board specifically adopted his finding that Litton had given the Union notice on November 18, 1980, that it did not propose to pay February, 1981 increases, in other words, well over 60 days' notice of its proposal. Pet. App. B 2, C 2-3. The Brief in Opposition at page 2 ignores this fact and misrepresents that the issue was initially disucssed on December 9, 1980. Nor did the Board reject his finding that there were 19 bargaining sessions between November 18, 1980, and the end of February, 1981, and that the February, 1981 wage increases were discussed at three of those sessions. Pet. App. C 2-6. So the Board, in adopting the judge's finding that Litton "made unilateral changes in violation of Sections 8(a)(5) and (1) by refusing to provide a

regularly provided semiannual increase in February 1981," could not possibly have thought Litton had made "a unilateral change" without bargaining with the Union "at all" as the Board Counsel erroneously claims. Indeed, the Board expressly found Litton had bargained in good faith in all 53 bargaining sessions which it reviewed. Pet. App. B 21-22. How can an employer bargain in good faith while refusing to bargain "at all" over the very guts of collective bargaining, wages? It is impossible.

Having rejected both reasons relied upon by the ALJ, and having adopted his findings Litton gave the Union at least 60 days' notice of its proposal not to pay February, 1981 increases, and that the parties had 19 bargaining sessions in which to discuss the matter and did in fact discuss the matter on three such occasions, upon what does the Board base its finding of a violation?

There is oniy one line of reasoning left upon which the Board could have relied: that as of February, 1981, when Litton did not pay the increases, it had not bargained to an impasse over its proposal not to pay them. That the Board reached this conclusion is inescapable for three reasons. First, the Board decision offers no other explanation. If this is not the reason, the Board has impermissibly failed to provide a rationale for its finding. Second, the Board, in the Remedy section of its decision, held that Litton would have to pay the February, 1981 increases and keep them in effect until the first part of August, 1981 because, by then, the parties had reached a valid impasse on wages and Litton had legally implemented its wage proposal not to pay February increases. Pet. App. 26, 34, 44. Obviously, the Board reasoned no impasse had been reached earlier, *i.e.*, in February of 1981. Third, the Court below must have thought the Board relied on its impasse rule;

otherwise, it would not have based its decision enforcing the Board's order on the impasse rule.

There are compelling reasons which this Court should hear for reversing the decision of the Court below with respect to the impasse requirement. The plain meaning of Sections 8(a)(5) and 8(d) conveys no requirement of an impasse. The legislative history of Section 8(d) makes it clear Congress could no longer tolerate the Board compelling employers to make concessions at the bargaining table by using the bad-faith bargaining rule. This Court has confirmed that fact, and has further observed the Board cannot compel concessions under the guise of exercising its remedial powers. *H. K. Porter Company, Inc., Etc. v. National Labor Relations Board*, 397 U.S. 99 at 106, 107-109 (1970).

The Board and Court below have incorrectly applied *National Labor Relations Board v. Katz*, 369 U.S. 736 (1962). *Katz* did not set forth an impasse requirement and stands for nothing more than the proposition an employer may not make changes in mandatory subjects of bargaining under negotiation without first notifying the union, or implement changes which differ in substance from those proposed to the union at the bargaining table, without notice. *Katz* simply does not hold that an employer must maintain the status quo *forever*, or until a dicey impasse is reached. By design, over the years, the Board has cited *Katz* for the proposition an impasse is required, and some courts have accepted the proposition as gospel truth, which it is not. It is possible to irrefutably demonstrate that the impasse requirement is an error which has crept into labor jurisprudence. This court should clarify the true holding and limits of *Katz* and correct the erroneous spin which the Board and some courts have placed on the case.

4. The petition not only presents the impasse question, it raises issues concerning the parameters of *Katz*, particularly, how can the Board hold Litton violated the Act by unilaterally not granting merit increases when, in *Katz*, the Court sustained a Board finding the employer violated the Act by unilaterally granting merit increases?

CONCLUSION

This is a case where the Board necessarily had to rely upon the impasse rule in order to adopt the finding of the ALJ that Litton violated the Act by not paying the February, 1981 merit increases. Indeed, the ALJ specifically found Litton "was obligated to bargain in good faith to impasse with the Union before" refusing to pay the increases. Pet App. C 12. The Board ordered Litton to pay the increase, but only until August, 1981, because by then an impasse had been reached and Litton had implemented its proposal not to pay such increases. Pet. App. B 34, 44. Furthermore, the decision of the court below, which Litton is asking this Court to review, clearly adopts the Board's impasse rule: "Thus, until parties reach impasse in negotiations over labor matters, an employer must 'maintain the status quo as to wages and working conditions.' " Citations omitted. Pet. App. A 3.

A serious injustice is about to be perpetrated if this petition is denied based upon Board Counsel's representation that the Board's decision was grounded upon a finding Litton did not pay February, 1981 merit increases without first notifying the Union of its intention and affording it an ample opportunity to bargain. This is not, as the Board contends, simply a *Katz* case. It cannot be a *Katz* case because the Board adopted the findings of the ALJ that the Union had more than 60 days' notice of

Litton's proposal not to pay the increases, that there were 19 bargaining meetings at which the proposal could have been discussed, and that it was discussed at three such meetings. Pet. App. B 2, C 2-6. This is purely and simply a case which fairly raises the impasse issue, an issue which the Board cannot dispute ought to be resolved by this Court.

One can only speculate why the Board would seek to convince this Court not to resolve an important, recurring and troublesome question swirling in controversy when the Board has only recently represented to this Court, in a most earnest fashion, that this Court ought to resolve the issue. *National Labor Relations Board v. Nabor Trailers, Inc. (NKA Steego Transportation Equipment Centers, Inc.)*, Docket No. 90-1165.

The petition should be granted.

DATED: April 6, 1992.

Respectfully submitted,

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